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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/628,963
Filing Date: July 29, 2003
Appellant(s): NYKAMP ET AL.

MAILED
MAY 16 2007
GROUP 1700

Charles E. Burpee
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed January 22, 2007 appealing from the Office action mailed October 5, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

Appeal No. 2005-1709 (Application No. 09/999,400)

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct. However, note independent claim 17 does not claim filing cabinets and drawer fronts.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

“Grounds of Rejection Not On Review”

The following grounds of rejection have not been withdrawn by the examiner, but they are not under review on appeal because they have not been presented for review in the appellant's brief:

I. Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Martinez (US 3,697,363) in view of Barler (US 2,438,108) and further in view of Vela (US 2001/0008702).

II. Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Martinez (US 3,697,363) in view of Vela (US 2001/0008702).

III. Claim 19 is rejected under 35 U.S.C. 103(a) as being unpatentable over Martinez (US 3,697,363).

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

| | | |
|--------------|---------------|---------|
| 2001/0008702 | Vela | 07-2001 |
| 3,697,363 | Martinez | 11-1970 |
| 2,438,108 | Barler et al. | 11-1943 |

(9) Grounds of Rejection

The following grounds of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claim 17 stands rejected under 35 U.S.C. 102(b) as being anticipated by Martinez (US 3,697,363).

Martinez discloses an article of office furniture comprising a metal office furniture piece (*Fig. 1*) including a plurality of components each having dimensions (*Fig. 1, elements 16, 16a and 16b*), and a plurality of magnetic decorative covers, each of the covers overlying and attached to one of the components (*Figs. 1 and 5, element 12*), each of the covers having dimensions substantially the same as the dimensions of the component to which the cover is attached (*Figs. 1 and 5, element 12*), each of the covers comprising a magnetic sheet (*see col. 3, lines 70-75*) and a decorative material such as veneer and a laminate (*see col. 3, lines 45-50 and col. 4, lines 1-7*).

Regarding the limitation “metal office furniture”, the Examiner has given the term the broadest reasonable interpretation consistent with the written description in applicant’s specification as it would be interpreted by one of ordinary skill in the art. See MPEP 2111. The Examiner has interpreted “metal office furniture” to mean furniture with any part that is metal. In this case, Martinez discloses the office furniture piece to include a metal part (*see col. 5, lines 5-11*) and therefore is considered metal office furniture.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 17 and 19 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Martinez (US 3,697,363) in view of Barler et al. (US 2,438,108).

Regarding claim 17, Martinez discloses an article of office furniture comprising an office furniture piece (*Fig. 1*) including a plurality of components each having dimensions (*Fig. 1, elements 16, 16a and 16b*), and a plurality of magnetic decorative covers, each of the covers overlying and attached to one of the components (*Figs. 1 and 5, element 12*), each of the covers having dimensions substantially the same as the dimensions of the component to which the cover is attached (*Figs. 1 and 5, element 12*), each of the covers comprising a magnetic sheet (*see col. 3, lines 70-75*) and a decorative material such as veneer and a laminate (*see col. 3, lines 45-50 and col. 4, lines 1-7*). However, Martinez fails to specifically teach the office furniture piece (cabinet) being made of metal.

Barler et al. teach that it is well known in the art to have a cabinet made completely of metal and it would have been obvious to one of ordinary skill in the art at the time the applicant's invention was made to have modified the cabinet in Martinez to be made only of metal as suggested by Barler et al. in order to save the step and money of gluing metal plates onto the components of the furniture piece as shown in Martinez.

Regarding claim 19, Martinez further fails to disclose one of the decorative covers defining a cutout providing an aesthetic appearance such as a logo.

It is to be noted that modifications to an "ornamental device" are purely decorative changes and do not change the way the device is used or works. Therefore, to have the magnetic decorative cover define a cutout providing an aesthetic appearance such as a logo is an obvious matter of design choice because it is merely changing the aesthetic design and/or the shape of the "ornamental" device.

In general terms the distinction between design and utility patents are that a “utility patent” protects the way an article is used and works (35 U.S.C. 101) and a “design patent” protects the way an article looks (35 U.S.C. 171). The ornamental appearance of an article includes its shape/configuration or surface ornamentation upon the article, or both. MPEP 1502.01.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the applicant’s invention was made to have modified one of the magnetic decorative covers in Martinez to define a cutout providing an aesthetic appearance such as a logo, since it is an obvious matter of design choice because it is merely changing the aesthetic design and/or the shape of the “ornamental” device.

Claim 18 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Martinez in view of Barler et al. as applied to claim 17 above, and further in view of Vela (US 2001/0008702 A1).

Martinez and Barler et al. teach the presently claimed article of office furniture as detailed above. However, Martinez fails to teach the magnetic sheet being flexible.

Vela teaches a magnetic sheet being flexible for easy application and removal of a magnetic material decoration without additional means of support and without causing damage to the support surface (*see paragraph 0002*).

Therefore, it would have been obvious to one of ordinary skill in the art at the time the applicant’s invention was made to have modified the magnetic sheet of the decorative covers in Martinez to be flexible as suggested by Vela in order to have easy application and removal of the

magnetic material decoration without additional means of support and without causing damage to the support surface (*see paragraph 0002*).

Claim 18 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Martinez (US 3,697,363) in view of Vela (US 2001/0008702 A1).

Martinez teaches the presently claimed article of office furniture as detailed above. However, Martinez fails to teach the magnetic sheet being flexible.

Vela teaches a magnetic sheet being flexible for easy application and removal of a magnetic material decoration without additional means of support and without causing damage to the support surface (*see paragraph 0002*).

Therefore, it would have been obvious to one of ordinary skill in the art at the time the applicant's invention was made to have modified the magnetic sheet of the decorative covers in Martinez to be flexible as suggested by Vela in order to have easy application and removal of the magnetic material decoration without additional means of support and without causing damage to the support surface (*see paragraph 0002*).

Claim 19 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Martinez et al. (US 3,697,363).

Martinez teaches the presently claimed article of office furniture as detailed above. However, Martinez fails to disclose one of the decorative covers defining a cutout providing an aesthetic appearance such as a logo.

It is to be noted that modifications to an "ornamental device" are purely decorative changes and do not change the way the device is used or works. Therefore, to have the magnetic decorative cover define a cutout providing an aesthetic appearance such as a logo is an obvious

matter of design choice because it is merely changing the aesthetic design and/or the shape of the “ornamental” device.

In general terms the distinction between design and utility patents are that a “utility patent” protects the way an article is used and works (35 U.S.C. 101) and a “design patent” protects the way an article looks (35 U.S.C. 171). The ornamental appearance of an article includes its shape/configuration or surface ornamentation upon the article, or both. MPEP 1502.01.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the applicant’s invention was made to have modified one of the magnetic decorative covers in Martinez to define a cutout providing an aesthetic appearance such as a logo, since it is an obvious matter of design choice because it is merely changing the aesthetic design and/or the shape of the “ornamental” device.

Claims 17-19 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Vela (US 2001/0008702 A1).

Regarding claims 17 and 18, Vela discloses an article of office furniture comprising a metal office furniture piece (file cabinet) including a plurality of components each having dimensions (*see paragraph 0013, line 8*); and a plurality of magnetic decorative covers wherein each of the covers are overlying and are attached to one of the components (*see paragraph 0020*) and each of the covers comprising a flexible magnetic sheet and a decorative material such as vinyl (*paragraphs 0011 and 0013*). Also, it is to be pointed out that Vela does teach the magnetic decorative covers as being large (*claim 1*) and the shape of the covers being die-cut for precise sizing (*paragraph 0019, lines 13-14*).

However, Vela fails to disclose each of the covers having dimensions substantially the same as the dimensions of the component to which the cover is attached.

It is to be noted that modifications to an “ornamental device” are purely decorative changes and do not change the way the device is used or works. Therefore, to have the magnetic decorative covers have dimensions substantially the same as the dimensions of the component to which the cover is attached is an obvious matter of design choice because it is merely changing the aesthetic design and/or the shape of the “ornamental” device.

In general terms the distinction between design and utility patents are that a “utility patent” protects the way an article is used and works (35 U.S.C. 101) and a “design patent” protects the way an article looks (35 U.S.C. 171). The ornamental appearance of an article includes its shape/configuration or surface ornamentation upon the article, or both. MPEP 1502.01.

It would have been obvious to one of ordinary skill in the art at the time the applicant’s invention was made to have modified the magnetic decorative covers in Vela to have dimensions substantially the same as the dimensions of the component to which the cover is attached, since it has been held that a change in the shape or size of the covers would be an unpatentable modification in absence of showing unexpected results and it has been held to be within the general skill of a worker in the art to select a shape or size on the basis of its suitability for the intended use as a matter of obvious design choice. Furthermore, it would have been obvious to one of ordinary skill in the art at the time the applicant’s invention was made to have modified the magnetic decorative covers in Vela to have dimensions substantially the same as the

dimensions of the component to which the cover is attached in order to decorate that component of the furniture piece in entirety, if so desired.

Regarding claim 19, Vela further fails to teach the decorative cover defining a cutout providing an aesthetic appearance such as a logo.

Again, modifications to an “ornamental device” are purely decorative changes and do not change the way the device is used or works. Therefore, to have the magnetic decorative cover define a cutout providing an aesthetic appearance such as a logo is an obvious matter of design choice because it is merely changing the aesthetic design and/or the shape of the “ornamental” device.

In general terms the distinction between design and utility patents are that a “utility patent” protects the way an article is used and works (35 U.S.C. 101) and a “design patent” protects the way an article looks (35 U.S.C. 171). The ornamental appearance of an article includes its shape/configuration or surface ornamentation upon the article, or both. MPEP 1502.01.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the applicant’s invention was made to have modified the magnetic decorative cover in Vela to define a cutout providing an aesthetic appearance such as a logo, since it is an obvious matter of design choice because it is merely changing the aesthetic design and/or the shape of the “ornamental” device.

(10) Response to Argument

Rejection of Claim 17 under 35 U.S.C. 102(b) based on Martinez

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Appellant's argue "Martinez does not disclose metal office furniture. Specifically, the furniture piece disclosed in Martinez is fabricated of wood (See Figs. 4, 6 and 7, and column 2, lines 55-62). The only metal in the Martinez wooden furniture is a separate sheet of metallic material that is glued to the wood furniture. (col. 5, lines 6-7). Wood furniture with a small metal part is not "metal office furniture" as understood in the art and as used in the present application".

However, it is to be pointed out that during patent examination, the pending claims must be "given their broadest reasonable interpretation consistent with the specification". See MPEP 2111. Thus, regarding the limitation "metal office furniture" in independent claim 17, the Examiner has given the term the broadest reasonable interpretation consistent with the written description in Appellant's specification as it would be interpreted by one of ordinary skill in the art. As noted in the 102 rejection, the Examiner has interpreted "metal office furniture" to mean furniture with any part that is metal. In this case, Martinez discloses the office furniture piece to include a metal part, which is adhered to the furniture piece (Fig. 8, #40a" and col. 5, lines 5-11), and therefore is considered metal office furniture.

Appellant's then argue that "any interpretation of the Martinez furniture piece as 'metal office furniture' is completely unreasonable, and no person of ordinary skill in the art would consider Martinez to disclose 'metal office furniture' as understood by those skilled in the art and as used in the present application".

Again, it is to be pointed out that during patent examination, the pending claims must be "given their broadest reasonable interpretation consistent with the specification". See MPEP 2111. Therefore, the Examiner has given the term "metal office furniture" in independent claim

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17 the broadest reasonable interpretation consistent with the written description in Appellant's specification as it would be interpreted by one of ordinary skill in the art. Again, as noted in the 102 rejection, the Examiner has interpreted "metal office furniture" to mean furniture with any part that is metal. In this case, Martinez discloses the office furniture piece to include a metal part, which is adhered to the furniture piece (Fig. 8, #40a" and col. 5, lines 5-11), and therefore is considered metal office furniture.

Appellant's further argue "the dimensions of the Martinez panel inserts 12' or 12" are not 'substantially the same as' the dimensions of the magnetic sheet elements 40' or 40" to which the inserts are attached. Further, the inserts are not 'attached to one of said components'. The Martinez inserts are attached to many elements 40 - each of which is far smaller than the insert 12. The structure is simply unlike the structure defined in claim 17".

First, it is to be pointed out that in Fig. 8, Martinez clearly shows the dimensions of the insert (cover) 12" being substantially the same as the dimensions of the magnetic sheet element 38" (col. 5, lines 12-14) to which the insert is attached. Second, it is to be pointed out that claim 17 recites "each of said covers having dimensions substantially the same as the dimensions of the component to which the cover is attached, each of said covers comprising a magnetic sheet and a decorative material". Claim 17 does not specifically recite that the dimensions of the magnetic sheet have to be "substantially the same as" the dimensions of the component to which the cover is attached. Only the cover has to have dimensions substantially the same as the dimensions of the component to which it is attached and the cover includes a magnetic sheet and a decorative material. As can be seen in Figs. 5-8, Martinez clearly discloses the inserts (covers) 12' or 12" as having dimensions substantially the same as the dimensions 15' or 15" of the component 14' or

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14" to which the insert (cover) is attached. The inserts (covers) 12' or 12" clearly are taught in Martinez to include a magnetic sheet 38' or 38" and a decorative material such as veneer 27' or 27" or laminate (col. 4, lines 4-12). Further, the inserts (covers) 12' or 12" are clearly "attached to one of said components" of the furniture piece. In Figs. 5-8 of Martinez, the inserts (covers) 12' or 12" are clearly shown as being attached to one of said components of the furniture piece 14' or 14". The inserts (covers) 12' or 12" in Martinez are taught to be attached to one of the components of the furniture piece via magnetic attraction (see column 3, lines 55-75 and column 4, lines 68 to column 5, line 2). Therefore, the structure in Martinez is very much like the structure as defined in claim 17.

Rejections of claims 17 and 19 under 35 U.S.C. 103(a) based on Martinez and Barler

Appellant's argue "Martinez and Barler are not combinable. There simply is no teaching, suggestion, or incentive supporting the combination suggested by the Examiners. Specifically, there is no suggestion in either reference, in the wooden furniture art, or the metal office furniture art to somehow combine the two references".

In response to Appellant's argument that there is no suggestion to combine the Martinez and Barler references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Martinez clearly teaches an article of office furniture comprising an office furniture piece (cabinet) including a plurality of components each

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having dimensions (Figs. 1 and 5-8, elements 14, 16, 16a and 16b), and a plurality of magnetic decorative covers (Figs. 1 and 5-8, elements 12' or 12''), each of the covers overlying and attached to one of the components (Figs. 5-8, elements 12' or 12''), each of the covers having dimensions substantially the same as the dimensions of the component to which the cover is attached (Figs. 5-8, elements 14' or 14''), each of the covers comprising a magnetic sheet (Fig. 5 and 8, elements 38' or 38'' and col. 4, line 7 and col. 5, lines 12-14) and a decorative material such as veneer and a laminate (Figs. 5-8, element 27' or 27'' and col. 3, lines 45-50 and col. 4, lines 1-7). Additionally, Martinez teaches metal office furniture as pointed out above. However, Martinez fails to specifically teach the office furniture being made of metal. Barler was merely cited to teach that it is old and well known in the art to have a cabinet (office furniture) made completely of metal and it would have been obvious to one of ordinary skill in the art at the time the applicant's invention was made to have modified the cabinet (office furniture) in Martinez to be made completely of metal as suggested by Barler in order to save the step and money of gluing metal plates onto the components of the furniture piece as disclosed in Martinez.

Appellant's then argue "any attempted combination of Barler with Martinez would actually destroy the intended function of Barler by covering up Barler's attractive, pre-enameled surface".

However, Examiner notes that Barler modifies Martinez not vice versa. Barler is merely cited to teach office furniture (cabinet) completely made of metal, in which case, when pure metal furniture is used in Martinez, the metal plates attached on the base panels of the furniture piece will not be needed.

Appellant's further argue "the only motivation for proposing the hypothetical combination of Martinez and Barler is an improper attempted hindsight reconstruction using the present specification as a roadmap. Such an approach is impermissible".

In response to Appellant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). As pointed out above, Martinez teaches office furniture (cabinet), but fails to specifically teach the furniture being made of metal. Barler, which also teaches office furniture (cabinet), was merely cited to teach that it is old and well known in the art to have a cabinet (office furniture) made completely of metal and it would have been obvious to one of ordinary skill in the art at the time the applicant's invention was made to have modified the cabinet (office furniture) in Martinez to be made completely of metal as suggested by Barler in order to save the step and money of gluing metal plates onto the components of the furniture piece as disclosed in Martinez.

Rejection of claims 17-19 under 35 U.S.C. 103(a) based on Vela

Appellant's argue "Vela does not disclose, teach or suggest the subject matter of the claimed invention – namely a metal office furniture piece having a plurality of components each covered by a magnetic cover 'having dimensions substantially the same as the dimensions of the

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component to which the cover is attached'. Nothing in Vela, other than impermissible hindsight, suggests the present invention as so defined".

In response to Appellant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). Vela clearly teaches metal office furniture (file cabinets) (paragraph 0013, lines 5-8 and paragraph 0020), which includes a plurality of components each having dimensions. Vela also teaches large, decorative magnetic covers that are to be attached to the furniture (see abstract and paragraphs 0001, 0019 and 0020). However, Vela fails to teach each of the magnetic covers "having dimensions substantially the same as the dimensions of the component to which the cover is attached". It is to be pointed out that Vela teaches *large*, decorative magnetic covers (paragraph 0001 and claim 1) and also teaches that the shape of the magnetic covers can be die-cut for precise sizing (paragraph 0019, lines 13-14). Additionally, it is to be noted that modifications to an "ornamental device" are purely decorative changes and do not change the way the device is used or works. Therefore, to have the magnetic decorative covers having dimensions substantially the same as the dimensions of the component to which the cover is attached is an obvious matter of design choice because it is merely changing the aesthetic design and/or the shape of the "ornamental" device.

In general terms the distinction between design and utility patents are that a “utility patent” protects the way an article is used and works (35 U.S.C. 101) and a “design patent” protects the way an article looks (35 U.S.C. 171). The ornamental appearance of an article includes its shape/configuration or surface ornamentation upon the article, or both. MPEP 1502.01.

Thus, it would have been obvious to one of ordinary skill in the art at the time the applicant’s invention was made to have modified the magnetic decorative covers in Vela to have dimensions substantially the same as the dimensions of the component to which the cover is attached, since it has been held that a change in the shape or size of the covers would be an unpatentable modification in absence of showing unexpected results and it has been held to be within the general skill of a worker in the art to select a shape or size on the basis of its suitability for the intended use as a matter of obvious design choice. Furthermore, it would have been obvious to one of ordinary skill in the art at the time the applicant’s invention was made to have modified the magnetic decorative covers in Vela to have dimensions substantially the same as the dimensions of the component to which the cover is attached in order to decorate that component of the furniture piece in entirety, if so desired.

Secondary Considerations Support the Lack of Obviousness

Appellant’s argue “the Declaration and attached evidence relate directly to the claimed subject matter. In fact, there are few differences between the claimed subject matter and the described apparatus and method. All of the facts, awards, and media coverage provide incredibly strong evidence both 1) of secondary considerations of nonobviousness and 2) that those skilled

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in the relevant art consider the present invention to be a significant development worthy of national and state awards”.

However, the declaration is insufficient because the facts presented are not germane to the rejection at issue and the showing is not commensurate in scope with the claims. It refers only to the system described in the above referenced application and not to the individual claims of the application. Thus, there is no showing that the objective evidence of nonobviousness is commensurate in scope with the claims. See MPEP § 716. In view of the foregoing, when all of the evidence is considered, the totality of the rebuttal evidence of nonobviousness fails to outweigh the evidence of obviousness. In conclusion, all of the facts, awards and media coverage fail to provide strong evidence.

(11) Related Proceeding(s) Appendix

Copies of the court or Board decision(s) identified in the Related Appeals and Interferences section of this examiner’s answer are provided herein.

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Catherine A. Simone *CAS*

May 7, 2007

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